SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ARTHUR DECARLO, JR., Personal Representative on behalf of the Estate of his father, ARTHUR DECARLO, SR. in his individual capacity, and on behalf of his father's heirs and next of kin, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, Defendant.	Index No. 161644/2015 Motion Sequence No. 5 **Hon. Manuel J. Mendez** **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NATIONAL FOOTBALL LEAGUE'S APPLICATION FOR AN ORDER TO SHOW CAUSE**

INTRODUCTION

Defendant National Football League ("Defendant" or the "NFL") respectfully asks the Court to order Plaintiff Arthur DeCarlo, Jr. ("Plaintiff") to show cause why an Order should not be entered pursuant to CPLR § 2201 to stay proceedings, including all discovery, in this action (i) pending the NFL's appeal to the First Department of this Court's January 26, 2017 decision and order denying the NFL's motion to dismiss the Complaint (the "Decision"); and (ii) to allow for coordinated discovery with *In re: National Football League Players' Concussion Injury Litigation*, No. 12-md-2323 (E.D. Pa.) ("MDL 2323").

PRELIMINARY STATEMENT

Based on the record described in the Affirmation of Bruce Birenboim, the Court should exercise its broad discretion to stay proceedings in this matter.

First, a stay will allow the First Department to address whether New York's discovery rule under CPLR 214-c applies to Plaintiff's claims. On May 12, 2017, the NFL filed a Notice of Appeal of this Court's Decision denying its motion to dismiss. The central issue on

appeal is whether CPLR 214-c tolls the statute of limitations for causes of action that, like those asserted by Plaintiff, involve purported neurocognitive impairments caused by head impacts or concussions. The NFL believes that a stay is warranted and its appeal has merit because the law is clear that CPLR 214-c does not apply to Plaintiff's causes of action, and his claims are therefore time-barred.

As an outgrowth of the law on toxic torts, CPLR 214-c applies only where a "substance" causes the alleged injury; injuries caused by objects, forces, or impacts—including alleged sub-concussive and concussive impacts—do not trigger the rule and toll the applicable statutes of limitation. In any event, even if CPLR 214-c applied, Plaintiff's claims would still be untimely because DeCarlo's decades of neurocognitive symptoms and 2005 diagnosis of dementia as "secondary to repeated injury [Mr. DeCarlo] received as a professional football player" put him on sufficient notice of his alleged injuries by, at the latest, 2005. Plaintiff's Complaint, filed in 2015, is therefore barred by the applicable statutes of limitation. In sum, the NFL's appeal is likely to succeed on the merits and proceeding to discovery while the appeal is pending will unnecessarily waste the resources of the judiciary and the parties. At the very least, given that the Court did not benefit from briefing on these issues because Plaintiff did not argue that CPLR 214-c applies, if CPLR 214-c is to be extended beyond its well-defined parameters, then it is appropriate to allow the parties to brief the issue and to defer to the First Department to guide the trial courts.

Second, a stay will allow for the coordination of discovery here with discovery in the more than 50 related actions that the NFL is simultaneously litigating in MDL 2323, in which retired NFL players—represented by the same counsel representing Plaintiff here—are seeking damages for neurocognitive impairments allegedly arising from playing professional football.

Indeed, based on nearly identical facts, another state court stayed proceedings so that an action brought by a retired NFL player could be coordinated with proceedings in MDL 2323.

Absent a stay, the NFL will suffer significant prejudice. Plaintiff's is the *only* pending NFL concussion case outside of MDL 2323. Material inconsistencies and inefficiencies, including conflicting discovery orders and duplicative depositions, undoubtedly will occur when litigating parallel matters in separate jurisdictions. This is especially so where, as here, the NFL believes this case is barred by the statutes of limitation and ought not to proceed in any event. Moreover, a short stay to enable coordination will not prejudice Plaintiff, who seeks only economic damages and is represented by the same counsel who has been appointed as Lead Counsel for all remaining plaintiffs in MDL 2323.

Accordingly, the NFL respectfully requests that this Court issue an order to show cause why an Order should not be entered staying proceedings pending a decision by the First Department on the NFL's appeal of the Decision and to allow for coordinated discovery with MDL 2323.

ARGUMENT

Pursuant to CPLR 2201, this Court has broad discretion to stay proceedings in any action before it. *See id.* ("Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."); *see also Landis* v. *North Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). "The only limitation on a stay [under CPLR 2201] . . . is the court's own sense of discretion, prudence, and justice." *Joseph* v. *Cheeseboro*, 42 Misc. 2d 917, 919 (Civ. Ct., New York County 1964), *rev'd on other grounds*, 43 Misc.2d 702 (App. Term 1964). It is well settled that

a court has broad discretion to stay proceedings where a pending "appeal has merit," *People ex. rel. Schneiderman* v. *Coll. Network, Inc.*, 53 Misc. 3d 1210(A), 2016 WL 6330584, at *5 (Sup. Ct., Albany County 2016), there is a "risk of inconsistent adjudications . . . and potential waste of judicial resources," *Zonghetti* v. *Jeromack*, 150 A.D.2d 561, 563 (2d Dep't 1989), or "prejudice will result from granting or denying a stay." *Coll. Network, Inc.*, 2016 WL 6330584, at *5.

That is the case here, and for the reasons below, this Court should issue an order that Plaintiff show cause why the Court should not exercise its discretion and stay proceedings, including all discovery. Not only is the NFL's appeal likely to prevail on the merits and render moot any proceedings here, but also, staying proceedings will allow discovery to be coordinated with discovery in the more than 50 related litigations pending in MDL 2323, where discovery is currently stayed. Moreover, the NFL will suffer substantial prejudice without a stay in the form of duplicative discovery, inconsistent or duplicative pretrial rulings, and wasted resources. By contrast, a stay will in no way prejudice Plaintiff, whose decedent passed away several years ago and whose case therefore presents purely economic considerations.

I. A STAY OF PROCEEDINGS IS APPROPRIATE AND WELL WITHIN THE COURT'S BROAD DISCRETION

A. A Stay of Proceedings is Appropriate Because the NFL's Appeal Has Merit

The Court should stay proceedings pending the NFL's appeal to the First Department of the Decision because "when determining whether a discretionary stay is appropriate," courts consider whether "the appeal has merit." *People ex. rel. Schneiderman* v. *Coll. Network, Inc.*, 53 Misc. 3d 1210(A), 2016 WL 6330584, at *5 (Sup. Ct., Albany County 2016); *see also Herbert* v. *City of New York*, 126 A.D.2d 404, 406-07 (1st Dep't 1987) ("[S]tays pending appeal will not be granted . . . where the appeal is meritless or taken primarily for the purposes of delay."); *In re Am. Hydrotherm Corp.*, 13 A.D.2d 825, 825 (2d Dep't 1961) (denying

appellant's stay of all further arbitration proceedings, pending appeal, "without prejudice to renewal upon proper papers establishing that there is merit in the appeal"). This Court did not have the benefit of any briefing by the parties on the applicability of the "discovery rule" under CPLR 214-c when it rendered the Decision—indeed, Plaintiff did not even mention CPLR 214-c in his papers—but, for the reasons below, binding New York precedent makes clear that CPLR 214-c does not apply to the instant case, and that, even if CPLR 214-c does apply, Plaintiff's claims still would be time-barred. The NFL's appeal therefore has merit, and a stay is appropriate here.

1. CPLR 214-c Does Not Apply to the Instant Case

New York courts traditionally follow the "first exposure" rule for accrual of personal injury claims: that is, the cause of action for a latent injury accrues on the day that the plaintiff first came into contact with the purported cause of his or her injuries rather than the date of plaintiff's discovery of the injury. *See Martzloff* v. *City of New York*, 238 A.D.2d 115, 117-18 (1st Dep't 1997) ("[Under] the traditional rule of *Schmidt* v. *Merchants Desp[atch] Transp. Co.*, [270 N.Y. 287, 300 (1936)] . . . 'it is th[e] first date of exposure from which the Statute of Limitations is to be measured, notwithstanding the fact that the individual may be unaware of any injury until some disease or condition manifests itself—often many years later.'" (quoting *Blanco* v. *Am. Tel. & Tel. Co.*, 223 A.D.2d 156, 162-63 (1st Dep't 1996))). The New York legislature enacted CPLR 214-c as a response to the perceived unfairness of the first exposure rule in the context of so-called "toxic tort" cases—such as those involving exposure to lead, asbestos, or harmful pharmaceutical products. Under this rule, referred to as the "discovery rule," the cause of action begins to accrue either when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the injury, whichever is earlier. *See*

CPLR 214-c. This provision, however, applies only in the limited circumstance where a personal injury results from exposure to a "substance." *Id.*

The New York appellate courts have repeatedly held that the term "substance" applies only to toxic substances, and *not* to objects, forces, or impacts. In *Blanco*, for example, which involved claims for repetitive stress injuries caused by keyboard use, the Court of Appeals held that keyboards are not "substances" for the purpose of tolling the statute of limitations under CPLR 214-c. *See Blanco* v. *Am. Tel. & Tel. Co.*, 90 N.Y.2d 757, 767, 770 (1997). Similarly, in *Martzloff*, where plaintiffs brought suit for hearing loss caused by exposure to the sound of gunfire at a firing range, the First Department likewise held that sound is not a "substance" under CPLR 214-c. *See* 238 A.D.2d at 115; *see also Via* v. *N.Y. City Hous. Auth.*, 137 A.D.3d 465, 466 (1st Dep't 2016) ("Plaintiff's bedbug claims are not governed by CPLR 214-c(3), because her injuries were not caused by a 'substance.'"); *Semenza* v. *Lilly's Nails*, 116 A.D.3d 409, 409 (1st Dep't 2014) ("Plaintiff [who was injured by a razor] may not avail herself of the tolling provision of CPLR 214-c(2), as . . . [a] razor is not a 'substance' within the meaning of the statute."); *Casson* v. *City of N.Y.*, 269 A.D.2d 285 (1st Dep't 2000) (reaffirming *Martzloff*).

Plaintiff, here, alleges that DeCarlo's NFL play exposed him to repetitive hits to the head—not to any "substance." Thus, under binding New York precedent, CPLR 214-c does not apply. In the absence of the discovery rule, this case is governed by the first exposure rule articulated in *Schmidt* or the test articulated in *Blanco* for repetitive stress injuries. *See Martzloff*, 238 A.D.2d at 117-18 ("[I]n circumstances where CPLR 214–c is inapplicable, the traditional rule of *Schmidt* . . . is controlling."); *Blanco*, 90 N.Y.2d at 774 (holding that in cases involving repetitive stress injuries, the cause of action accrues "upon the onset of symptoms or the last use of the injury-producing device, whichever is earlier"). Under either rule, Plaintiff's

causes of action expired under the applicable statute of limitations long before he filed the Complaint because he alleges that DeCarlo last played NFL football in 1961 (and began experiencing symptoms thereafter).

2. Plaintiff's Claims Are Time-Barred Even if CPLR 214-c Applies

But even if, contrary to settled law, CPLR 214-c were to apply to exposure to concussions or repetitive hits to the head, the First Department is still likely to find that Plaintiff's claims are time-barred. Binding precedent and Plaintiff's own complaint make clear that, even under this discovery rule, DeCarlo's alleged 2005 diagnosis of dementia secondary to repeated head trauma during NFL play put Plaintiff on sufficient notice to trigger the statute of limitations.

In *In re New York County DES Litigation*, 89 N.Y.2d 506 (1997), the Court of Appeals held that, in the context of CPLR 214-c, "the only reasonable inference is that when the Legislature used the phrase 'discovery of the injury' it meant discovery of the *physical condition* and not, as Plaintiff argues, the more complex concept of discovery of both the condition and the nonorganic *etiology* of that condition." *Id.* at 514 (emphasis added); *see also Vincent* v. *N.Y. City Hous. Auth.*, 129 A.D.3d 466, 467 (1st Dep't 2015) ("[A] 'cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the *manifestations and symptoms of his or her physical condition*, *i.e.*, when the injury is apparent, not when the specific cause of the injury is identified.'" (emphasis added) (quoting *Searle* v. *City of New Rochelle*, 293 A.D.2d 735, 736 (2d Dep't 2002))); *Ward* v. *Lincoln Elec. Co.*, 116 A.D.3d 558, 559 (1st Dep't 2014) (finding that the statute of limitations began to run under CPLR 214-c, at the latest, once plaintiff "had persistent, severe, progressively worsening symptoms that limited his physical activity, for which he sought regular, ongoing medical

treatment"). It is against these binding precedents that the First Department must consider the factual allegations of the Complaint and the proper application of CPLR 214-c.

Here, Plaintiff may not have discovered the neuropathological presence of CTE, the alleged etiology of DeCarlo's neurocognitive condition, until after DeCarlo's death, but DeCarlo—as alleged in the Complaint—was well aware of his alleged claims more than eight years before his death. Indeed, the Complaint alleges that DeCarlo began experiencing "CTE-related symptoms"—including headaches, memory loss, and confusion—by 1993, and he received a diagnosis of dementia as "secondary" to NFL football by 2005. Thus, even if CPLR 214-c were to apply, Plaintiff's claims are still time-barred on the face of the Complaint, and the NFL's appeal is therefore likely to succeed on the merits and render any proceedings here moot. And in any event, to the extent the well-established scope of CPLR 214-c is to be extended, it is appropriate to defer to the First Department to do so in the first instance.

B. A Stay of Proceedings Will Allow for Coordinated Discovery with MDL 2323

The Court should also grant a stay to allow for discovery here to be coordinated with MDL 2323, where discovery is currently stayed pending Judge Brody's decision on motions regarding threshold legal issues. *See Asher* v. *Abbott Labs.*, 307 A.D.2d 211, 212 (1st Dep't 2003) (granting a stay where it would "avoid duplication of effort and waste of judicial resources" and "avoid[] the risk of inconsistent rulings").

Stays under such circumstances are common, as federal and state court judges "frequently cooperate informally and effectively to coordinate discovery and pretrial proceedings in mass tort cases." *Manual for Complex Litigation (Fourth)* § 22.4; *see also In re NYSE Euronext Shareholders/ICE Litig.*, 39 Misc. 3d. 619, 626-27 (Sup. Ct., New York County 2013) ("[I]t is the policy of the federal courts to encourage coordination of pending state and federal cases concerning the same and closely related transactions." (quoting *In re MetLife*

Demutualization Litig., 689 F. Supp. 2d 297, 307 (E.D.N.Y. 2010))); *In re Neurontin Prod. Liab. Litig.*, 24 Misc. 3d. 1215(A), 2009 WL 1979936, at *1 n.1 (Sup. Ct., New York County 2009) (noting that a joint hearing was held "in recognition of the importance of coordinating related federal and state litigations in order to reduce costs and delays"); Order at 5, *In re Phenylpropanolamine Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash. Jan. 29, 2002), ECF No. 164 (ordering "a discovery schedule that will aid in fostering state and federal court coordination of PPA cases, and completing the tasks undertaken in the MDL 1407 with reasonable dispatch in keeping with the needs and expectations of litigants"); *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 1999 WL 124414, at *1 (E.D. Pa. Feb. 10, 1999) (ordering "state/federal coordination of discovery"); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 U.C.L.A. L. Rev. 1851, 1864-65 (1997) (noting that in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL 926 (N.D. Ala.), the court appointed a special master for coordination of discovery conducted in federal court with that conducted in the various state courts). Coordination is all the more appropriate where the similarity between the federal and state cases is great. *See id.* at 1865-66. That is the case here.

This action is substantially similar to approximately 50 cases pending in MDL 2323. The overlap of factual and legal issues suggests that the discovery sought from the NFL in this case—which is likely to be burdensome and involves allegations ranging *over sixty years*—would be in many respects identical to that sought by the plaintiffs in MDL 2323. To name but a few areas of overlap, Plaintiff here and those in MDL 2323 will likely seek documents and depositions related to the NFL's purported knowledge about the effects of head trauma (Compl. ¶¶ 106-109), any research performed by the NFL or the Mild Traumatic Brain Injury Committee

concerning head trauma (*id.* ¶¶ 53-55), and any proposed NFL rule changes intended to protect against head trauma (*id.* ¶ 112).

Indeed, at least one court has already recognized that a stay of concussion-related litigation is warranted to allow for coordination with MDL 2323. That case, *Amerson* v. *National Football League*, involved facts nearly identical to those here. In *Amerson*, like here, a retired player brought an action alleging claims arising out of purported neurocognitive impairment caused by concussive and sub-concussive impacts experienced while playing in the NFL. *See* Mem. Supp. NFL Def.'s Mot. Stay at 4-13, *Amerson* v. *Nat'l Football League*, No. 120900326 (Pa. Ct. Common Pleas Dec. 11, 2012) (Exhibit A to Affirmation of Douglas M. Burns); Order at 1, *Amerson*, (Dec. 19, 2012) (Exhibit B to Affirmation of Douglas M. Burns). The NFL moved to stay proceedings, explaining that such a stay was needed "to coordinate this case with the MDL to facilitate an efficient and streamlined resolution of pretrial proceedings in these substantially similar lawsuits," (Exhibit A at 10), and the court in *Amerson* agreed, holding that "[a]ll proceedings in this case are stayed until this Court orders otherwise." (Exhibit B at 1.) The same result ought to control here.

Finally, because "some or all of the parties in the related actions have the same counsel," coordination is particularly appropriate here. *See Manual for Complex Litigation* (Fourth) § 20.311. Plaintiff's counsel, Wendy Fleishman of Lieff, Cabraser, Heimann & Bernstein LLP, is also the court-appointed Lead Counsel for all remaining opt-out plaintiffs in MDL 2323. Thus, Plaintiff's counsel is well-situated to ensure the efficient coordination of discovery here with that in MDL 2323.

II. A STAY WILL CONSERVE JUDICIAL RESOURCES, PREVENT PREJUDICE TO THE NFL, AND IN NO WAY PREJUDICE PLAINTIFF

In considering a stay, courts should evaluate "any prejudice [that] will result from granting or denying a stay." *People ex. rel. Schneiderman* v. *Coll. Network, Inc.*, 53 Misc. 3d 1210(A), 2016 WL 6330584, at *5 (Sup. Ct., Albany County 2016). Absent a stay here, discovery in this action and in MDL 2323 will proceed blindly and without coordination. The NFL then may face inconsistent discovery orders with conflicting requirements for establishing privilege, relevance, and responsiveness; if these requirements differ, the NFL may have to duplicate efforts in collecting, reviewing, and producing discovery; and its employees may have to appear at multiple depositions to answer the same questions. It is, thus, no surprise that a leading treatise recognizes that efforts to "coordinate parallel or related litigation . . . reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation." *Manual for Complex Litigation (Fourth)* § 20.31; *see also In re Neurontin Prod. Liab. Litig.*, 24 Misc. 3d. 1215(A), 2009 WL 1979936, at *1 n.1 (Sup. Ct., New York County 2009) (holding joint *Frye*/*Daubert* hearings in related state case and federal MDL "in recognition of the importance of coordinating related federal and state litigations in order to reduce costs and delays"). In addition, because this case is the *only* NFL concussion action outside of MDL 2323, a stay will completely eliminate the risks of duplicative proceedings and wasted resources described above.

Moreover, a stay will not prejudice Plaintiff in any meaningful way. Plaintiff's counsel is also Lead Counsel for all remaining opt-out plaintiffs in MDL 2323, so Plaintiff is likely to see direct benefits from coordination. In addition, Plaintiff is the authorized representative of the estate of an individual who passed away several years ago. Thus, this case involves purely economic considerations, and a brief delay will cause no harm to Plaintiff. *See Asher* v. *Abbott Labs.*, 307 A.D.2d 211, 212 (1st Dep't 2003) (granting a stay where "plaintiffs

ha[d] not demonstrated how they would be prejudiced"); *see also Channel Master Corp.* v. *JFD Elecs. Corp.*, 26 A.D.2d 961, 961 (3d Dep't 1966) (ordering a stay of all further proceedings pending outcome of related federal action).

In sum, the balance of prejudice tips decisively in favor of granting a stay.

CONCLUSION

For the foregoing reasons, the NFL respectfully requests that the Court issue an order that Plaintiff show cause why the Court should not stay proceedings in this action pending resolution of the NFL's appeal to the First Department of the Decision and to allow for coordinated discovery with MDL 2323.

Dated: New York, New York
May 16, 2017

Respectfully submitted,

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